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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF TEXAS, *Plaintiff*,

v.

STATE OF OKLAHOMA, *Defendant*.

SUPPLEMENTAL BRIEF OF TEXAS POWER & LIGHT COMPANY IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE IN SUPPORT OF THE STATE OF TEXAS

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On February 13, 1980, Texas Power & Light Company (TP&L) filed a motion to intervene in support of the State of Texas with a supporting statement in the above entitled original action. On August 29, 1980, the Special Master requested the States of Texas and Oklahoma to file, on or before October 1, 1980, responses to TP&L's motion to intervene and authorized TP&L to file a supplemental brief in support of its intervention. Specifically, the Special Master desired that the filings be directed to the question of "whether or when intervention of a private party is appropriate in original jurisdiction proceedings."

TP&L has a distinct and compelling interest in the outcome of the instant case, and, as an original principal in the underlying litigation, should be granted leave to intervene.

I. The Supreme Court's Rules Provide for Intervention By a Private Party In an Original Action

The Supreme Court's Rule 9, "Procedure in Original Actions" provides that the Federal Rules of Civil Procedure "may be taken as a guide to procedure." Rule 24(a)(2) of the Federal Rules of Civil Procedure, provides that intervention:

> shall be permitted . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

II. The Supreme Court on Several Occasions has Permitted Intervention by a Private Party in Original Actions

In an earlier proceeding involving the two parties to the instant case, *Oklahoma* v. *Texas*, 258 U.S. 574 (1922), which also was concerned with the boundary formed by the Red River, numerous parties were permitted to intervene. The Supreme Court held that intervention should be permitted as a matter of fairness because the proceeding was the only one in which the intervenors' rights could be determined (258 U.S. at 581):

> Numerous parties have since intervened for the purpose of asserting rights to particular tracts in

the receiver's possession and are seeking to have the same and the net proceeds of the oil and gas taken therefrom surrendered to them. Many of these claims conflict one with another and all are in conflict with the claims of one or more of the three principal litigants.

[1] Under the Constitution (article 3, § 2), our original jurisdiction extends to suits by one state against another and to suits by the United States against a state. In its first stage this was a suit by one state against another. When the United States intervened it became also a suit by the United States against those states. In its enlarged phase it presents in appropriate form the conflicting claims of the two states and the United States to the river bed and calls for their adjudication. The other claims, being for particular tracts and funds in the receiver's possession and exclusively under our control, are brought before us because no other court lawfully can interfere with or disturb that possession or control. It long has been settled that claims to property or funds of which a court has taken possession and control through a receiver or like officer may be dealt with as ancillary to the suit wherein the possession is taken and the control exercised—and this although independent suits to enforce the claims could not be entertained in that court.

In another original action involving a boundary dispute between Texas and Louisiana, the City of Port Arthur, Texas [1] was permitted to intervene "for purposes of protecting its interests in the island claims of the United States". *Texas* v. *Louisiana,* 426 U.S. 466 (1976).

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[1] While the City arguably is not a "private party", there is no indication it received special treatment because of its status as a city. As indicated, intervention was granted because of its interests in the proceeding.

More recently, on November 14, 1977, the Supreme Court upheld its Special Master in overruling an exception to his Report permitting several individuals to intervene in an original action. *South Dakota* v. *Nebraska*, 46 U.S.L.W. 3322 (1977). This ruling is particularly pertinent because the proceeding involved a boundary dispute between two states resulting from an alleged accretion caused by river currents which would change the boundary between them. The Special Master permitted the interventions because the interest of the individuals was different from that of the States. (See, "Report of Special Master and Recommendation" attached hereto as an appendix).

III. Texas Power & Light Company has a Distinct and Compelling Interest in This Original Action

This proceeding was commenced by the State of Texas when it filed a Complaint stating that a dispute exists as to the boundary between the State of Texas and the State of Oklahoma in the vicinity of Lake Texoma. The State of Texas specifically asks that the boundary be established as the south cut bank of the Red River as it existed prior to the construction of the Denison Dam which forms Lake Texoma. The State of Oklahoma has responded, stating that "there is an actual controversy involving a conflict of the sovereign interests" of the two States.

This dispute first arose in a proceeding before the Federal Energy Regulatory Commission (FERC), *Texas Power & Light Company*, Docket No. E-9578, which involves the question of whether TP&L is sub-

ject to FERC's jurisdiction.[2] In that proceeding, the FERC sought to adjudicate the boundary between Texas and Oklahoma at the United States Corps of Engineers' Denison Dam so as to determine if interstate energy entered or left the TP&L system. At issue before the FERC was the question whether construction of the Denison Dam had caused a change in the south bank of the Red River by accretion or by avulsion. After the FERC ordered an evidentiary hearing on that issue, the State of Texas petitioned to intervene in the FERC proceeding and moved to stay that proceeding, so as to allow this Court to make the boundary determination. After this Court accepted the Complaint filed by the State of Texas, the FERC granted the motion for stay of its proceeding insofar as the Texas-Oklahoma boundary was at issue.

The State of Texas is interested in this issue because if there is a determination that the border between Texas and Oklahoma has shifted southward, it would result in a loss of territory by the State of Texas. TP&L has an entirely separate and fundamental interest in this boundary determination.

TP&L purchases under long term contracts with the Southwestern Power Administration, substantial quantities of electric energy generated at the Denison Dam. If there is a finding that the power house at the Denison Dam, which was constructed in the State of Texas, is now located in the State of Oklahoma, then

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[2] Because no interstate energy enters or leaves the TP&L system, it never has been subject to the jurisdiction of FERC. As an intrastate utility, it is regulated by the Public Utility Commission of Texas.

electric energy would cross the Oklahoma-Texas state line and enter TP&L's facilities. This passage of energy in interstate commerce would subject TP&L and all interconnected electric utilities within the State of ~~Oklahoma~~ Texas, to the jurisdiction of the FERC rather than sole regulation by the Public Utility Commission of Texas.

Such jurisdiction would change the method of operation employed by TP&L and other interconnected utilities and could imperil the reliability of service which these utilities render, as well as placing other burdens on their customers. For many years, the interconnected electric systems in the State of Texas have been constructed to enable them to operate most efficiently and reliably by utilizing facilities and rendering service entirely within the State of Texas. If the FERC were to achieve jurisdiction over TP&L, it could result in a massive disruption of this method of operation with major adverse consequences to TP&L and its customers.

TP&L agrees with the State of Texas that the construction of Denison Dam did not change in any manner the boundary between Texas and Oklahoma. The boundary remains the south cut bank of the Red River as it existed prior to the construction of the Dam.

However, as indicated, the interest of TP&L is quite distinct from that of the State of Texas. The State of Texas is concerned with its territorial integrity and TP&L with its status as a utility regulated by local authorities rather than the FERC. Consequently, TP&L's unique interest in this proceeding may not be adequately represented by existing parties.

IV. Texas Power & Light Company's Intervention in This Proceeding is Necessary Because It is so Situated that the Disposition of this Action May as a Practical Matter Impair or Impede Its Ability to Protect Its Interest

As previously indicated, Rule 24 of the Federal Rules of Civil Procedure provides for intervention by a private party in an original action proceeding where the applicant for intervention "is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect [his] interest" in the proceeding. The Supreme Court is the only forum where boundary disputes between states can be adjudicated. For that reason, the Court, on at least three occasions involving such boundary disputes, has permitted intervention by outside parties where, as here, the applicant for intervention's ability to protect his interest otherwise would be "impair[ed] or impede[d]". These interventions were granted in proceedings in which the fact situations were remarkably similar to that in the instant case.

In *Oklahoma* v. *Texas, supra,* intervention was granted to numerous parties because the Supreme Court recognized that there was no other forum for them to protect their interests. Here, because the Supreme Court is the only forum available to litigate the sole issue in this case, the location of the Texas-Oklahoma state line, TP&L is in the identical position of the intervenors in *Oklahoma* v. *Texas.* The Supreme Court is the only place in which TP&L can protect its interests.

There is a difference between the cases, however, which lends even greater support to TP&L's interven-

tion. In *Oklahoma* v. *Texas,* there were "numerous intervenors" which could expand the scope of the proceeding beyond the original action concept. Here, there is only one intervenor with no intention of expanding the scope of the proceeding, and there is no present prospect of additional intervenors.

Both *Texas* v. *Louisiana* and *South Dakota* v. *Nebraska,* like the instant proceeding, involve boundary disputes between States. As indicated at page 4, *supra,* the *South Dakota* case is particularly pertinent because the issue of a boundary change resulting from alleged accretion caused by river currents is identical to the issue that underlies the instant case. In the *South Dakota* case the intervenors' interest involved land title and the States were concerned with sovereignty. Here, the States are concerned with sovereignty and TP&L's interest involves its jurisdictional status which, if anything, is even further removed from the interest of the States than was the case in the *South Dakota* proceeding.

Finally, it should be pointed out that TP&L was the party below that originally opposed the concept of a change in the State boundary resulting from alleged accretion of the banks of the Red River. TP&L vigorously opposed such a change because it was vital to its particular interest. The State of Texas has brought this action because it correctly submits that only the Supreme Court can adjudicate a State boundary determination. However, equity demands that TP&L, the original party below with a vital interest in the boundary determination, should be permitted to pursue its

interest before the Supreme Court, the only forum capable of making such a determination.

Wherefore, Texas Power & Light Company respectfully submits that there is ample precedent to support its motion for leave to intervene.

Respectfully submitted,

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